179 D

FILED

No. 10-892 JAN 5 - 2011

OFFICE OF THE CLERK

In The Supreme Court of the United States

TADEUSZ PALKA,

Petitioner,

v

ROGER SHELTON and JAMES DAVIS, two COOK COUNTY SHERIFF POLICE DETECTIVES, COOK COUNTY SHERIFF THOMAS DART; THOMAS KINSELLA, formerly COOK COUNTY SHERIFF'S DEPARTMENT INSPECTOR GENERAL; COOK COUNTY SHERIFF ASSISTANT GENERAL COUNSEL PETER M. KRAMER; WILLIAM CUNNINGHAM, JR., COOK COUNTY SHERIFF'S DEPARTMENT CHIEF OF STAFF; HENRY BARSH, COOK COUNTY SHERIFF'S DEPARTMENT ASSISTANT EXECUTIVE DIRECTOR OF IAD; THE CITY OF CHICAGO; THE CHICAGO POLICE DEPARTMENT; ASSISTANT DEPUTY SUPERINTENDENT CONSTANTIN ANDREWS OF THE FIRST DEPUTY'S OFFICE OF THE CHICAGO POLICE; CHICAGO POLICE COMMANDER JOSEPH SALEMME, AREA FIVE DETECTIVE UNIT; CHICAGO POLICE DEPARTMENT ASSISTANT DEPUTY SUPERINTENDENT MATTHEW TOBIAS; and CHICAGO POLICE COMMANDER NICHOLAS J. ROTI,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

L. STEVEN PLATT
PEDERSEN & HOUPT
161 N. Clark, Suite 3100
Chicago, IL 60601
(312) 261-2171
lsplatt@pedersenhoupt.com

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

This case presents the recurring issues regarding procedural and substantive due process claims and occupational liberty claims brought under 42 U.S.C. § 1983. Petitioner, Tadeusz Palka, a 28-year employee with the Cook County Sheriff's Department was retaliated against by individuals at the Sheriff's Department and the Chicago Police Department when he complained about his son being terminated from the Chicago Police Academy. He was visited in the middle of the night at his suburban residence by uniformed Commanders of the Chicago Police and told to back off. He was then falsely accused of making a telephone call to the parochial school of the Assistant Deputy Chicago Police Commander, Matthew Tobias' (ADS Tobias), the head of the Police Academy, allegedly offering to send "flowers" to the children at school on their birthdays. He was forced to resign based on the flower claim which was fabricated based on suspect evidence put together by Chicago Police Commanders on company time, and then retaliated against because he brought this action. The Sheriff refuses to give him his retirement badge and firearms credentials which would enable him to get another job in law enforcement. The lack of credentials is depriving him of the ability to work in his chosen profession of 28 years. The complaint below was dismissed on a Fed. R. Civ. P. 12(b)(6) motion. The issues are:

QUESTIONS PRESENTED – Continued

1. Does a tenured Sheriff's Deputy covered by a collective-bargaining agreement have a "property interest" in continued employment by the County?

2. Does the conduct of ADS Tobias and the Police Commanders he enlisted to make a case against Palka based on the flowers claim, visiting Palka at night out of jurisdiction, abusing and misusing Police resources including the "Leads System" to track Palka down, subverting internal Police procedures to do the investigation, convincing the Sheriff's Department to suspend and then initiate termination proceedings against Palka, violate Palka's substantive due process rights which protect citizens from abuses of power by executive officials?

3. Does the Sheriff's Department's continued refusal to give Palka his retirement badge and firearms credentials which would enable him to get another job in law enforcement after 28 years as a Sheriff's Deputy, violate Palka's interest in occupational liberty?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINION AND JUDGMENT BELOW 1

STATEMENT OF JURISDICTION 1

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION ... 23

THE SEVENTH CIRCUIT MISINTERPRETED THE FOURTEENTH AMENDMENT 24

A. The Seventh Circuit's Errors on the Procedural and Substantive Due Process Claims 25

B. The Seventh Circuit's Errors on the Occupational-Liberty Claim 31

C. The Seventh Circuit's Errors on the *Monell* Claim 32

CONCLUSION 33

APPENDIX

October 7, 2010 Order and Judgment of the Court of Appeals for the Seventh Circuit ..... App. 1

TABLE OF CONTENTS – Continued

Page

December 17, 2008 Memorandum and Opinion of the District Court granting Defendants' Fed. Rule of Civ. Pro. 12(b)(6) Motion to Dismiss the Third Amended Complaint.....App. 15

TABLE OF AUTHORITIES

Page

CASES

Bd. of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972) 25, 31

Belcher v. Norton, 497 F.3d 742 (7th Cir. 2007) 30

Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998) 28

Burrell v. City of Matoon, 378 F.3d 642 (7th Cir. 2004) 25

Christensen v. County of Boone, 483 F.3d 454 (7th Cir. 2007) 33

County of Sacramento v. Lewis, 523 U.S. 833, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998) 30

Doherty v. City of Chicago, 75 F.3d 318 (7th Cir. 1996) 19

Dusanek v. Hannon, 677 F.2d 538 (7th Cir. 1982) 28, 29

Hudson v. City of Chicago, 374 F.3d 554 (7th Cir. 2004) 26

Johnson v. Martin, 943 F.2d 15 (7th Cir. 1991) 32

Kernats v. O'Sullivan, 35 F.3d 1171 (7th Cir. 1994) 31

Krieg v. Seybold, 481 F.3d 512 (7th Cir. 2007) 27

Lashbrook v Oerkfitz, 65 F.3d 1339 (7th Cir. 1995) 32

Lee v. County of Cook, 862 F.2d 139 (7th Cir. 1988) 27

TABLE OF AUTHORITIES – Continued

Page

Loudermill v. Cleveland Board of Education, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985) 25

Minch v. City of Chicago, 486 F.3d 294 (7th Cir. 2007) 27

Monell v. Department of Social Services, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978) ..... *passim*

Montgomery v. Stefaniak, 410 F.3d 933 (7th Cir. 2005) 30

Patterson v. Portch, 853 F.2d 1399 (7th Cir. 1988) 28, 29

Phelan v. City of Chicago, 347 F.3d 679 (7th Cir. 2003) 26

Ratliff v. City of Milwaukee, 795 F.2d 612 (7th Cir. 1986) 32

Reeves v. Sanderson Plumbing, Inc., 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000) 26

Russ v. Watts, 414 F.3d 783 (7th Cir. 2005) 30

Townsend v. Vallas, 256 F.3d 661 (7th Cir. 2001) 28, 32

Tun v. Whitticker, 398 F.3d 899 (7th Cir. 2005) 31

Young v. N. Drury Lane Prods., 80 F.3d 203 (7th Cir. 1996) 27

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES AND RULES

28 U.S.C. § 1254(1) 1

29 U.S.C. § 1331 1

42 U.S.C. § 1983 ..... 1, 3, 20, 23

U.S. Const. amend. XIV ..... *passim*

Fed. R. Civ. P. 12(b)(6) 16, 31

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION AND JUDGMENT BELOW

The District Court's unpublished opinion is unofficially reported as *Palka v. Cook County*, 2008 U.S. Dist. LEXIS 101750 (N.D. Ill., Dec. 17, 2008) and is reprinted in the Appendix ("Pet. App.") at 16-40. The Court of Appeals opinion is reported as *Palka v. Shelton,* 623 F.3d 447 (7th Cir. 2010), and is reprinted in Pet. App. 1-15.

STATEMENT OF JURISDICTION

The District Court had jurisdiction under 29 U.S.C. § 1331, The Court of Appeals issued its judgment on October 7, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Provision in question is contained at 42 U.S.C. § 1983 which says:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

The Fourteenth Amendment to the United States Constitution provides:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

STATEMENT OF THE CASE

I. Introduction

Stating a claim pursuant to 42 U.S.C. § 1983, Palka alleges that the Respondents were acting under color of state law when they deprived him of a Constitutional right. The Fourteenth Amendment imposes constraints on government actions which deprive an individual of "liberty" or "property" interests within the meaning of the Due Process Clause. Pet. App. 22-27.

For his due process claim, Palka pleads that he had a property interest in continued employment. Here, Palka asserts that the Respondents "acting under color of state law, deprived plaintiff of his property right to remain employed as a Sheriff's Deputy with a gold badge." Compl. ¶ 59. Pet. App. 22-23.

A. Palka's Due Process Claims

Palka next alleges that "The Sheriff's Department suspended Palka in violation of the collective-bargaining agreement because they did not call his union representative to be present during the de-deputization process and during a subsequent interview with IAD," and that "they also violated the contract by not giving Palka an answer concerning the so-called investigation that followed, within 30-days, and instead kept him in limbo under suspension until March of 2008 when they brought him up on charges before the Merit System Protection Board

(MSPB) over the alleged phone call incident." Compl. ¶¶ 39, 40. Palka was covered by a collective-bargaining agreement and the Respondents violated that agreement. A collective-bargaining agreement is not a contract of employment and creates a property interest in continued employment. He alleges that his suspension and then impending termination if he did not resign, deprived him of a property interest without due process. Pet. App. 7-8.

1. Procedural Due Process

Palka alleges that the Due Process Clause of the XIV Amendment guarantees fair procedure. Palka first alleges that Respondents deprived him of procedural due process when they put him on suspension without a hearing. Compl. ¶ 37. Pet. App. 28.

Palka next alleges that he was denied procedural due process when he was deprived of his property right to remain employed as a Deputy Sheriff without a hearing. Compl. ¶ 59. He was forced to resign because he was brought up on charges before the MSPB over the alleged phone call incident. Compl. ¶ 40. After Palka was referred to the MSPB for termination, Palka was told that if he wanted to retire then the MSPB action would "go away" and that Palka would receive a retirement badge and his firearm credentials. Compl. ¶ 57. Palka was entitled to, and would have received a hearing on the charges that were filed with the MSPB but he was advised that the fix was in and that he would not receive a

fair hearing he decided to take the Sheriff Department's offer and resign from his employment as a Deputy Sheriff. Compl. ¶ 52. Pet. App. 28-30.

2. Substantive Due Process

Palka also contends that the Respondents violated his substantive due process when they abused their power by conducting a high priority investigation of Palka in the way that they did. Palka further contends that Respondents' decision to file formal charges against him and "push him out" was irrational because he had nothing to do with making the threatening phone call to Tobias children's school. Pet. App. 7.

Here, the fundamental right at issue is Palka's claimed property right in continued employment. Employment rights by a public employee rise to the level of a "fundamental" right protected by substantive due process. *Id.*

Palka's first alleges that the Respondents violated his substantive due process because they abused their authority when they conducted their investigation of him in the manner in which they did. Specifically, Palka contends that Respondents abused their authority when they used the Leads System to run his name, when they ran his driver license to check for outstanding warrants, when they went out of their jurisdiction to talk to him at his home, when they made false accusations against him regarding the alleged phone call and when they filed formal charges

against him with the MSPB. Tobias concocted an allegation that his children's school had been contacted by someone who inquired about his children. After alleging this, Tobias enlisted the aid of Commander level police officers at the Chicago Police to help put together a case against Palka. Tobias claims that the call was made by an individual with an Eastern European (Polish) accent. How he could know this is unclear. Tobias claims to have traced the phone call that was made to his children's school to a phone number belonging to a Cook County building. Tobias knew that Palka was a Cook County employee. When Tobias asked Andrews and Salemme to pay a threatening visit on Palka at his house outside of Chicago, he was asking two senior level police officers to make an in-person threat outside of the Chicago Police Department's jurisdiction. Pet. App. 7-12.

Before formal charges were filed against Palka with the MSPB, Tobias conducted his unauthorized investigation through the Chicago Police Department ("CPD"). Tobias alleged without basis in fact that Palka called his children's school inquiring if they were present and put him, his wife and the schools staff in fear that Palka was stalking his children and that he had intentions of possibly harming them. Pet. App. 10-11.

These facts as pleaded do not demonstrate that Tobias had authority to misuse Chicago Police resources to conduct an investigation into a private matter or that he had the right to enlist the Police Department to assist in the investigation. The fact that the Respondents abused their official authority

while conducting the investigation by going outside their jurisdiction to question Palka and by using the Leads System to run his name, these alleged abuses of power are sufficient for Palka show that the Respondents' violated his substantive due process rights. Respondents' decision to file formal charges against Palka with the MSPB was arbitrary and irrational and rise to the level of an abuse of power by Tobias that was "conscious shocking." Pet. App. 10-12.

Additionally, there is no adequacy of state remedies or any other Constitutional rights that were violated. Therefore, Palka had a property interest in his continued employment, and properly stated a claim for a violation of his substantive due process. *Id.*

B. Occupational Liberty Claim

Palka next raises a Fourteenth Amendment claim, alleging a deprivation of his occupational liberty interest in his career as a Sheriff's Deputy and a law enforcement officer. Specifically, Palka contends that all of the Respondents deprived him of his "property right to remain employed as a Sheriff's Deputy with a gold badge" and his "property right to obtain another law enforcement job, depriving him of a chance to earn his chosen livelihood, in violation of the Constitution of the United States." Compl. ¶ 59. Pet. App. 12-14.

The concept of liberty protected by the Due Process Clause includes one's occupational liberty, or the liberty to follow a trade, profession, or other calling. The government violates an employee's occupational liberty interest when, in the course of discharge, failure to rehire, or other adverse employment action, the employer stigmatizes the employee by making public comments that impugn the individual's good name, reputation, honor, or integrity or impose a stigma or other disability on the individual which forecloses other opportunities. The Fourteenth Amendment protects an individual's liberty to pursue a particular occupation. *Id.*

Palka has sufficiently plead the deprivation of an occupational liberty interest, by claiming: (1) that the Respondents have stigmatized him by claiming he was investigated for making threatening phone calls to Tobias' childrens' parochial school, (2) that the comments were publicly disclosed; and (3) that he has suffered and continues to suffer a tangible loss of other employment opportunities as a result since he can't work in law enforcement without his retirement badge and firearms credentials. *Id.*

1. Stigmatizing Comments and Public Disclosure

Palka alleges that public officials, namely the Sheriff's Department, by keeping the record of his referral to the MSPB, are asserting facts that are not true and haven't been proven.

He next alleges that the stigmatizing statements are publicly disclosed

Here, Palka's complaint alleges that on May 11, 2007, Tobias falsely and without a reasonable basis complained to the Sheriff's Department Internal Affairs Division ("IAD"), in a General Complaint Register, that Palka telephoned the church office of his children's school to inquire if Tobias' children were present. Tobias falsely told the IAD, and included in the Complaint Register, that Palka's telephone call to the school put members of the church staff and Tobias' wife in fear that Palka was attempting to stalk Tobias' children, that Tobias feared that Palka had intentions of harming his children, that Palka had caused the principal and the teaching staff at the school to be in fear for the safety and well-being of Tobias' children, and that Palka had made numerous attempts to adversely impact Tobias' position with the CPD in retribution for recommending the employment discharge of his son Peter Palka, Palka also alleges that Tobias told Andrews, Salemme, Roti and other police officers that a threatening phone call was made to his children's school and asked them to help him investigate the incident. Finally, Palka alleges that on September 5, 2007, the IAD unit of the Sheriff's Department met with the Cook County State's Attorney's Office and told them about the phone call incident. Pet. App. 12-14.

Palka has pled sufficient facts to allege that Respondents' allegations against him were stigmatizing. Allegations that an individual engaged in criminal conduct, if false, may injure an individual's good

name, damage an individual's reputation in the community and be considered stigmatizing. *Id.*

Palka's complaint also alleges that the Respondents "publicly communicated these stigmatizing comments by failing to give him his retirement badge and firearms credentials." The only people who don't get those are people who are discharged for cause and when Palka applies for jobs in law enforcement the fact that he doesn't have these documents stigmatizes him and prevents him from getting law enforcement jobs. *Id.*

C. *Monell* Claim

In his Third Amended Complaint, Palka sought to hold Cook County and the City liable for their alleged Constitutional violations. A municipal government, however, can be held liable under § 1983 for the deprivation of constitutional right caused by municipal policy or custom. *Monell v. New York Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). To support his *Monell* Claim, Palka alleges Respondents have a widespread practice of "intimidation, harassment and retaliation of anyone who crosses ADS Tobias or anyone at the Deputy Superintendent or Commander level at the CPD, and that the Sheriff's Department gives inordinate attention to the unsubstantiated complaints against its employees by anyone who is a "big wheel" at the C.D." Compl. ¶ 61. This alleged a policy or practice results in a deprivation of a Constitutional

right. Further, as set forth above, Palka has alleged facts sufficient to state a claim for a violation of due process and has stated a claim for a deprivation of occupational liberty, therefore to the extent that Palka bases his *Monell* Claim on the alleged constitutional deprivations stated in his complaint, he has successfully alleged the deprivation of a Constitutional right. Pet. App. 14.

II. The Record Below

Tadeusz Palka alleges that his son, Peter J. Palka ("Peter Palka"), was terminated from the Chicago Police Academy on February 1, 2007 due to his national origin (Polish). Third Amend. Compl. ¶ 5. Palka spoke to Assistant Deputy Superintendent Matthew Tobias, the individual who terminated Peter Palka, and asked him to allow Peter Palka back in class. *Id.* ¶ 6. Tobias refused, and Palka retained counsel to look into the matter. *Id.* ¶¶ 7-8. Palka's attorney attempted to talk to Dora Henmann ("Henmann"), the Chicago Police Academy's Firearms Instructor, who told Tobias that Peter Palka had not passed his firearms test despite the fact that Peter Palka had passed a state firearms test two years before and had been a Rosemont Illinois police officer before joining the Chicago Police Academy. Tadeusz Palka hired a lawyer to talk to Henmann about his son's termination from the Academy, but Henmann refused to discuss the matter. *Id.* ¶¶ 9-12. Pet. App. 17-18.

On May 9, 2007, Tobias claims a threatening phone call was made to his children's parochial school, the caller alleged to have been a middle age man with a Polish accent, calling to find out the children's' birthdays so he could send them flowers on their birthdays. *Id.* ¶ 56. Tobias contacted Police Commanders Andrews, Salemme, Chicago Police Commander Roti and other Chicago Police officers to investigate the phone call incident. *Id.* Tobias also visited the Park Ridge Police where the school was located, to report the alleged incident. *Id.* After running checks on the phone numbers that were used to call his children's school Tobias claimed that the calls came from a Cook County building. *Id.* Alleging that Palka may have been the caller, Tobias ran Palka's name through the Chicago Police's "Leads System," a police system designed for police work that provides confidential information on suspects including confidential home address information on them. Pet. App. 18.

On the evening of May 10, 2007, at approximately 10:30 p.m. when Palka arrived home, he discovered Chicago Police Commanders Salemme and Andrews waiting for him. *Id.* ¶ 13. Prior to Palka's arrival, the Commanders woke up his 91-year old neighbor and frightened her demanding to know whether Palka was at home. *Id.* ¶ 14. When Palka pulled into his driveway, the Commanders demanded to speak with him. *Id.* ¶ 15. The Commanders then accused Palka of making the alleged threatening phone call to

Tobias' children's school, an accusation that Palka denies. *Id.* ¶¶ 16-19. Pet. App. 18-19.

The Police Commanders told Palka that they knew it was he who called the school but that it was not "a big deal" and "don't do it anymore." *Id.* ¶ 22. The Commanders then brought up the fact that Palka had a son who was recently kicked out of the police academy and told him not to "push" that and that his son was not going to get his job back. *Id.* ¶¶ 23-25. Palka told the Commanders he was talking to a lawyer about his son's reinstatement, and the Commanders then left Palka's home. *Id.* ¶¶ 26-27. Andrews and Salemme were out of their jurisdiction when they went to question him because Palka lives in the Chicago suburb of Norridge and the Commanders are Chicago Police Department Commanders. Their visit violated police protocol. *Id.* ¶¶ 28, 30. Pet. App. 19.

The next day, May 11, 2007, Palka saw Chief Edward Carek ("Carek") and told him about Andrews' and Salemme's visit the night before. *Id.* ¶ 32. Carek said, "This is a serious thing if they came by your house." *Id.* ¶ 33. Palka then went to Edward Wodnicki ("Wodnicki"), his supervisor, and told him about the prior evening. *Id.* ¶ 34. Wodnicki told Palka not to worry about it. *Id.* ¶ 35. However, later that day, the Director of the Cook County Sheriff's Department IAD, Raymond T. Zene ("Zene"), visited Wodnicki. *Id.* ¶ 36. Tobias had filed a General Complaint Register with the Sheriff's IAD alleging that

Palka had made a threatening phone call to his children's school. *Id.* ¶ 56. Tobias further stated that he was scared for his children and that Palka was angry with Tobias because Peter Palka had been terminated from the police academy. *Id.* Palka was then called to Wodnicki's office, where Zene took his badge and identifications, and put him on paid suspension. *Id.* ¶ 37. Zene told Palka that a "big wheel" at the CPD told him to do this. *Id.* ¶ 38. Wodnicki stated, "What did I tell you? You tried to help your son and you got screwed." *Id.* ¶ 42. An IAD investigator later took Palka downstairs to "show everyone" that he was no longer a deputy. *Id.* ¶ 43. Palka became sick over his situation and had do go on medical leave. *Id.* ¶ 44. Pet. App. 19-20.

After Palka was de-deputized, Zene summoned Palka to his office to discuss the phone call allegations. *Id.* ¶ 46. There, IAD detectives Shelton and Davis claimed that Palka had told them that he was sorry and would not make any more phone calls. *Id.* ¶ 47. Palka says he never made the call nor did he say such a thing. *Id.* ¶ 48. The IAD detectives spoke to Palka's lawyer Sally Ann Cromin ("Cromin") and told her that they would drop the charges if Palka resigned from the Sheriff's Office. Palka refused the offer. *Id.* ¶¶ 55-58. The IAD detectives told Palka's lawyer that they were referring him to the State's Attorney's Office for criminal prosecution. *Id.* ¶ 50. On September 5, 2007, the IAD unit met with a Cook County Assistant State's Attorney to discuss the charges against Palka stemming from the phone call

incident but the State's Attorney never pressed charges against Palka. *Id.* ¶¶ 51, 56. Pet. App. 20.

Palka alleges that the IAD detectives attempted to intimidate many of his friends and associates. *Id.* ¶ 52. Palka alleges that he was harassed because he challenged Tobias' decision to dismiss his son from the police academy. *Id.* ¶ 53. Pet. App. 20-22.

In March 2008 Henry Barsh ("Barsh"), Assistant Executive Director of the IAD, filed charges against Palka with the Merit Systems Protection Board ("MSPB") and recommended his termination. *Id.* ¶ 55. After Palka was referred to the MSPB, he was approached by Carek who told him that if he retired, the MSPB action would "go away" and he would receive his retirement badge and his firearms credentials like all other Sheriff retirees do. *Id.* ¶ 57. Palka feeling he had no alternatives resigned from his position as a Deputy Sheriff. *Id.* ¶ 52. Pet. App. 21-22.

Palka alleges that the individual Respondents abused their power when they conducted a high priority investigation concerning the phone calls to Tobias' children's school. Palka alleges that after the investigation revealed Palka's potential involvement in the phone call incident, Zene put him on suspension in violation of his collective-bargaining agreement because Zene did not call his union representative to be present during the de-deputization process and during a subsequent interview with IAD.

Id. ¶ 39. Palka also alleges that Zene violated his collective-bargaining agreement by not giving Palka an answer about his pending investigation until March of 2008 when he was brought up on charges before the MSPB. *Id.* ¶ 40. Pet. App. 21.

District Court Proceedings

The District Court granted Respondents' 12(b)(6) motions to dismiss. The court held that Palka did not plead sufficient facts to show that he had a property interest. The court held that although at the motion to dismiss stage, it must accept all well-pleaded facts in the complaint as true, the Court did not have did not have to accept as true what it deemed to be conclusory statements of law or unsupported conclusions of fact. It held that Palka's complaint did not identify the source of his alleged property interest, that he did not allege that it was created by any state or city law, that he had a contract giving him tenure to remain employed at the Sheriff's office or that there was a clearly implied promise in his continued employment. The court held that Palka's conclusion of fact that he had a property right to remain employed as a Sheriff's Deputy was insufficient to properly plead a property interest in employment. Pet. App. 24-27.

Next the court held that simply stating that he had a collective-bargaining agreement and that the Respondents violated that agreement, without more,

is insufficient to allege a property interest in his job. The court held that this is because a collective-bargaining agreement is not a contract of employment and does not generally create a property interest in continued employment. The court then held that because a property interest is required to state a cause of action for a due process violation and Palka failed to allege facts from which a property interest can be conferred. Pet. App. 24-26.

On the deprivation of a property right without due process claim, the court held that in procedural due process claims, the deprivation by state action of a constitutionally protected property interest is not itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law. The court held that to determine if a violation of procedural due process occurred, it is necessary to ask what process the Defendants provided, and whether it was constitutionally adequate. The court said that while due process is a flexible concept that varies with the particular situation, the Constitution requires some type of hearing before the government deprives a person of liberty or property. Pet. App. 26-30.

The court held that the problem with Palka's claim is that Palka acknowledges that he was put on suspension and therefore did not suffer any economic loss as a result of his suspension and non-pecuniary losses do not constitute property. Therefore, it held that Palka did not have a due

process right to a hearing prior to his suspension without pay. Pet. App. 27-30.

The court next held that Palka was never terminated by the Sheriff's Department, he resigned. In March 2008, the Sheriff's Department brought Palka up on charges before the MSPB over the alleged phone call incident. After Palka was referred to the MSPB for termination, Palka was told that if he wanted to retire then the MSPB action would "go away" and that Palka would receive a retirement badge and his firearm credentials. Compl. ¶ 57. Palka was entitled to, and would have received a hearing on the charges that were filed with the MSPB but instead decided to take the Sheriff Department's offer and resign from his employment as a Deputy Sheriff. It held that Palka's assertion that he had no choice but to resign does not turn his decision to resign into a formal discharge by the Sheriff's Department. The court said that no matter how uncomfortable the situation was for Palka, his situation is not comparable to intolerable working conditions in which a reasonable employee in his position would have felt compelled to resign. Pet. App. 30-34.

On the substantive due process claim the District Court held that where the exercise of government power involves law enforcement officials, a plaintiff's substantive due process rights are violated where the alleged abuse of power "shocks the conscience." The court held that the facts in this case did not shock the conscience, that the misuse of the Leads System to run his name, when they ran his driver's license to

check for outstanding warrants, when they went out of their jurisdiction to talk to him at his home, when they made false accusations against him regarding the alleged phone call and when they filed formal charges against him with the MSPB, that none of that "shocks the conscience." Pet. App. 30-34.

The court held that these facts as pleaded demonstrate that Tobias had reason to conduct an investigation into the threatening phone call that was made to his children's school and to enlist the Police Department to assist in the investigation. Even if the Respondents abused their official authority while conducting the investigation by going outside their jurisdiction to question Palka or by using the Leads System to run his name, these alleged abuses of power are not sufficient for Palka show that the Defendants' violated his substantive due process rights. This is because Defendants' alleged abuses of power do not describe conduct that amounts to a constitutional violation, the alleged conduct is not "conscience shocking." Pet. App. 30-34.

Additionally, the court held that Palka has failed to allege the inadequacy of state remedies and has not alleged that any of his other substantive Constitutional rights were violated. *See Doherty v. City of Chicago*, 75 F.3d 318, 325 (7th Cir. 1996). Therefore, even if Palka had a property interest in his continued employment, he has failed to state a claim for a violation of his substantive due process. Pet. App. 30-34.

On the deprivation of occupational liberty claim, the court held that the government violates an employee's occupational liberty interest when, in the course of discharge, failure to rehire, or other adverse employment action, the employer stigmatizes the employee by making public comments that impugn "the individual's good name, reputation, honor, or integrity" or impose a "stigma or other disability on the individual which forecloses other opportunities." The court noted that not every comment that could damage an individual's reputation is actionable; however, the Fourteenth Amendment only protects against those comments that could seriously damage one's reputation and standing in the community. Pet. App. 34-39.

The court held that Palka pled sufficient facts to allege that Respondents' allegations against him were stigmatizing. However, the court ruled that Palka's complaint did not allege that Respondents publicly communicated these stigmatizing comments. Pet. App. 34-39.

With respect to Palka's *Monell* Claim, the court held that a municipal government, cannot be held liable under §1983 "unless the deprivation of constitutional right is caused by municipal policy or custom. The court held that it did not need to address if Palka had adequately pleaded a widespread policy or practice because Palka had not alleged a policy or practice that resulted in a deprivation of a Constitutional right. (Emphasis added). Further, as set forth above, Palka has failed to allege facts sufficient to

state a claim for a violation of due process and has failed to state a claim for a deprivation of occupational liberty, therefore to the extent that Palka bases his *Monell* Claim on the alleged constitutional deprivations stated in his complaint, he also fails to allege the deprivation of a Constitutional right. Therefore, the court ruled that Palka had failed to state a *Monell* Claim. Pet. App. 39-40.

The appellate court held that the allegations were reviewed as to whether they were plausible on their face. They held that they weren't.

The court first held that because the County, not the City, was Palka's employer, Palka cannot sue the City and its employees for depriving him of due process in connection with the loss of his employment.

The court also held that Palka's interest in continued employment required him to allege that the collective-bargaining agreement contained a promise of continued employment. The allegation that he was scheduled to appear before the Merit Board on disciplinary charges and that only tenured employees would be entitled to a hearing before this board was sufficient for the Appellate Court to consider whether Palka's allegations stated a cognizable claim for violation of his right to procedural due process. Pet. App. 39-40.

Because the court held that Palka had not claimed that he suffered any indirect economic consequences as a result of his suspension with pay, to the

extent that he claimed he was deprived of due process prior to his suspension, he did not state a valid constitutional claim.

The Court held that a coerced resignation is characterized by the presence of a Hobson's choice in which the employee must resign or suffer severe consequences, such as facing criminal charges. It held that Palka's claim failed because he alleges that the Respondents forced him to choose between resigning to protect his retirement benefits or clearing himself before the Merit Board. They held that the Merit Board provides adequate procedural protections to Cook County employees facing disciplinary charges, and its formal procedures were underway when Palka chose to resign. The Merit Board's disciplinary process satisfies the County's procedural due process obligations, and the County and its officials cannot be held liable when an employee chooses not to avail himself of its protections. Pet. App. 39-40.

The Appellate Court also held that the District Court properly dismissed Palka's substantive due process claim. They held that Palka had not pleaded an additional Constitutional violation or claimed that state-law remedies were inadequate. He therefore has failed to state an actionable substantive due process claim. 623 F.3d at 452.

The Court also held that Palka's substantive due process claim failed to the extent that he based it on the conduct of the Police Department officials. The court held that Tobias' conduct and the conduct of the

other Chicago Police in this matter did not shock the conscience. 623 F.3d at 453-454.

On the occupational liberty claim, the Court held that Tobias' complaint was not publicly disclosed; Tobias' stigmatizing allegations were made only to the Sheriff's Department, Palka's employer, and not a potential future employer. That the allegations were relayed to the State's Attorney's Office does not make a difference. 623 F.3d at 454.

Finally on the *Monell* Claim, the court held that because it had determined that all of plaintiffs' claims under federal law were properly dismissed, there could be no § 1983 liability under *Monell* 623 F.3d at 454-455.

REASONS FOR GRANTING THE PETITION

This case presents occasion for the Court to settle issues that continue to disturb and confuse the rights of individuals against vis-à-vis state and municipal governments. The Seventh Circuit in adopting the decision of the District Court gave short shrift to Palka's Constitutional rights and his property interest in his job. They also gave short shrift to the right of an individual to protect his property right to a job against retaliation for having asserted Constitutional Rights against an employer.

Neither Congress nor this Court have authorized state and local officials to usurp their rights of their

employees and unsettle long-established civil service and union protections and merit systems simply because the complaining party has clout. Further the courts below failed to recognize the right of an individual to constructive discharge when the remedies that appear to be valid are not valid at all. No one requires individuals under the Constitution to engage in the futile exercise of due process especially when that exercise might result in a worse result than resignation.

THE SEVENTH CIRCUIT MISINTERPRETED THE FOURTEENTH AMENDMENT

Section 1 of the Fourteenth Amendment provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

The *Fourteenth Amendment* prohibits the deprivation of life, liberty or property without due process of law. A liberty or property interest protected under the *Fourteenth Amendment* may not be seized or impaired by a state actor, unless that deprivation is accompanied by the requisite due process. The "root requirement" of due process is "that an individual be given a hearing before he is deprived of any

significant property interest." *Burrell v. City of Mattoon,* 378 F.3d 642, 648 (7th Cir. 2004) (holding "Burrell was not deprived of his job, thus, no process was due; he suffered no constitutional deprivation at the hands of the individual defendants or the City"). In *Burrell*, newly elected officials indicated to the plaintiff that he would not be reappointed to his position as City Clerk.

A threshold requirement for a due process claim to be actionable is that a party must establish that the defendant deprived him of a "protectable" liberty or property interest. Where a party fails to establish that he suffered the deprivation of a protected liberty or property right, then his due process claim would not be actionable. *Loudermill v. Cleveland Board of Education*, 470 U.S. 532, 538, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985) (*quoting Board of Regents v. Roth*, 408 U.S. 564, 576-78 (1972)).

Whether a liberty or property interest merits the protection of the *Fourteenth Amendment* depends on state law. The Supreme Court has recognized that "[p]roperty interests are not created by the Constitution, 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" *Id.*

A. The Seventh Circuit's Errors on the Procedural and Substantive Due Process Claims

Palka's complaint alleges two separate procedural due process violations: First, he claims he was

deprived of due process prior to his suspension; and second, he claims he was deprived of due process prior to his resignation, which he contends was coerced. Palka pled sufficiently a cognizable property interest, a deprivation of that interest, and a denial of due process. *Hudson v. City of Chicago*, 374 F.3d 554, 559 (7th Cir. 2004). The court erred that as a threshold matter, the procedural due process claims against the City and its employees failed because the County, not the City, was Palka's employer. If the City can influence the decision of the County to retain an employee as it did here, then, Palka can sue the City and its employees for depriving him of due process in connection with the loss of his employment. *See Reeves v. Sanderson Plumbing, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000) (age discrimination claim actionable against company even though ageist remarks not made by decision maker – the power to "effectively" recommend is enough to trigger liability).

The court further erred when it said that Palka failed to state a cognizable claim against Cook County or any of its employees. A property interest in continued employment is established in one of two ways, 1) by an independent source such as state law securing certain benefits; or 2) by a clearly implied promise of continued employment. *Phelan v. City of Chicago*, 347 F.3d 679, 681 (7th Cir. 2003) (quotation marks omitted). Due process claims in the context of public employment do not require much because most civil service jobs are tenured and the individuals

cannot be fired without cause. Therefore they have "a legitimate claim of entitlement not to lose a valuable governmental benefit except for cause." *Lee v. County of Cook*, 862 F.2d 139, 141 (7th Cir. 1988) (quotation marks omitted).

Furthermore, Palka was covered by a collective-bargaining agreement. Collective-bargaining agreements exist to protect employees against terminations for anything other than cause. Therefore the very existence of a collective-bargaining agreement creates an employment contract and thus a promise of continued employment in all cases. *Krieg v. Seybold*, 481 F.3d 512, 519-20 (7th Cir. 2007); *see also Young v. N. Drury Lane Prods.*, 80 F.3d 203, 206 (7th Cir. 1996) (noting that a labor agreement exists to protect employment rights and restrict the right of employers to terminate employees at will). When a plaintiff alleges that the due process entitlement arises from a collective-bargaining agreement, he need not identify specific terms of the agreement that contained a promise of continued employment as such is implied. *Krieg*, 481 F.3d at 520; *see also Minch v. City of Chicago*, 486 F.3d 294, 302 (7th Cir. 2007).

Palka did plead that he was a member of a collective-bargaining unit and did not have to identify a provision in the collective-bargaining agreement that specifically gave rise to a constitutionally protected property interest in continued employment. *See Krieg*, 481 F.3d at 520. As the court conceded, he did allege that he was scheduled to appear before the Merit Board on disciplinary charges; only tenured

employees are entitled to a hearing before this board. The Court then properly assumed that this allegation was sufficient and moved on to consider whether Palka's allegations stated a cognizable claim for violation of his right to procedural due process. That should have been enough.

Regarding his suspension, Palka's suspension was no less a tangible job action than the consequences facing Kimberly Ellerth in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998), where her supervisor retaliated against her for not acceding to his demands by giving her neutral job performance ratings from that point forward. This Court found that to be actionable and ruled accordingly. He was not required to allege that his suspension imposed a substantial indirect economic effect. *See Townsend v. Vallas*, 256 F.3d 661, 676 (7th Cir. 2001) (loss of income fails to be actionable if it is de minimus).

Palka also alleged that he was deprived of due process prior to his resignation; this claim rests on his contention that his resignation was involuntary. A public employee who voluntarily resigns can complain about a lack of due process if the resignation is truly involuntary. *Dusanek v. Hannon*, 677 F.2d 538, 543 (7th Cir. 1982). As the Court properly noted, two types of involuntary resignation may qualify – constructive discharge and coerced resignation. *Patterson v. Portch*, 853 F.2d 1399, 1405-06 (7th Cir. 1988). Constructive discharge occurs when an employer makes employment so unbearable that an employee

resigns; coerced resignation is characterized by the presence of a Hobson's choice in which the employee must resign or suffer severe consequences, such as facing criminal charges. *See id.* The court improperly ruled that Palka's claim falls in the latter category because he alleged that the Respondents forced him to choose between resigning to protect his retirement benefits or clearing himself before the Merit Board.

Palka was confronted with a difficult choice when the disciplinary charges were lodged against him and the Merit Board hearing loomed. He could retire with full benefits or appear before the Board and potentially be vindicated; the latter option, however, obviously risked termination and loss of his benefits if the charges were substantiated. But this is not the kind of choice that makes an otherwise voluntary resignation involuntary. The Merit Board under these circumstances did not provide adequate procedural protections to Cook County employees facing disciplinary charges, and its formal procedures were underway when Palka was forced to resign. The Merit Board's disciplinary process did not satisfy the County's procedural due process obligations, and the County and its officials cannot be held liable when an employee chooses not to avail himself of its protections. *See Dusanek*, 677 F.2d at 543. This is not a situation where safeguards were made available and the plaintiff simply refused to avail himself of them. Rather it is a situation where the fix was in and he was moving toward an inevitable result. That Palka decided to resign rather than risk an unfavorable

Merit Board decision makes his resignation involuntary. The district court was wrong to dismiss his procedural due process claim.

The court also improperly dismissed Palka's substantive due process claim. This sort of claim applies to violations of fundamental rights, *see Belcher v Norton*, 497 F.3d 742, 753 (7th Cir. 2007), and employment related rights are fundamental; an alleged wrongful termination of public employment is actionable as a violation of substantive due process regardless of whether the employee also alleges the Respondents violated some other constitutional right or that state remedies were inadequate, *Montgomery v. Stefaniak*, 410 F.3d 933, 939 (7th Cir. 2005).

Palka's substantive due process claim also should have succeeded to the extent that he based it on the conduct of the Police Department officials. The Due Process Clause protects citizens from abuses of power by executive officials – including law-enforcement officers – and official misconduct will rise to the level of a Constitutional violation if it shocks the conscience. *Russ v. Watts*, 414 F.3d 783, 789 (7th Cir. 2005); *see also County of Sacramento v. Lewis*, 523 U.S. 833, 846-47, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998). Palka contends that the police officers' investigation – tracing the phone call to the school, their use of the "Leads System," and the fact that they traveled outside their jurisdiction to track him down at his house at night – subverted internal Police Department rules and therefore qualifies as conscience-shocking official misconduct. We are not

talking about some minor threshold of governmental misconduct. We are talking about an abuse of those police powers. *Tun v. Whitticker*, 398 F.3d 899, 903 (7th Cir. 2005) (actions of officials can rise to the level of a constitutional violation if they shock the conscience); *Kernats v. O'Sullivan*, 35 F.3d 1171, 1175 (7th Cir. 1994) (many forms of official abuse of power is unreasonable, unjustified, or outrageous, and thereby rises to the level of a federal constitutional deprivation. Further, the court on a 12(b)(6) motion was required to accept as true Palka's allegations and if that is done, he stated a cognizable substantive due process claim.

B. The Seventh Circuit's Errors on the Occupational-Liberty Claim

Palka has also alleged a violation of his interest in occupational liberty. This claim rests on Tobias' complaint to the Sheriff's Department and the County's failure to give him a retirement badge and firearms credentials following his resignation. An occupational-liberty claim arises when, after an adverse employment action, a public employer stigmatizes the employee by such things as compelled self-disclosure making public comments impugning his good name, honor, or reputation or imposes a stigma that forecloses other employment opportunities. *Bd. of Regents v. Roth*, 408 U.S. 564, 573-74, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). Under this doctrine, a plaintiff must plead that (1) the defendant made stigmatizing comments about him; (2) those comments were

publicly disclosed; and (3) he suffered a tangible loss of other employment opportunities as a result of the public disclosure. *Townsend*, 256 F.3d at 669-70. The public disclosure element does not really require that the Respondent actually disseminate the stigmatizing comments in a way that would reach potential future employers or the community at large. *Ratliff v. City of Milwaukee*, 795 F.2d 612, 627 (7th Cir. 1986) (if reasons for the person's departure are not restricted to internal use they are actionable); *see also Johnson v. Martin*, 943 F.2d 15, 16-17 (7th Cir. 1991) (same).

Palka alleged that the complaint Tobias filed with the Sheriff's Department falsely asserted that he engaged in criminal conduct and that his failure to receive a retirement badge and firearms credentials upon his resignation exacerbated the impression left by the false allegations. Tobias' complaint is a matter of public record and can be and has been widely disseminated throughout the community. An occupational-liberty claim is created where "the circumstances made it virtually impossible for [the plaintiff] to find a new position in his chosen profession." *Lashbrook v. Oerkfitz*, 65 F.3d 1339, 1349 (7th Cir. 1995) (citing *Ratliff*, 795 F.2d at 625). The district court therefore improperly dismissed this claim.

C. The Seventh Circuit's Errors on the *Monell* Claim

Finally, Palka asserted claims against the City and County under *Monell v. Department of Social*

Services, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). The court therefore improperly ruled that his complaint failed to state a claim for any constitutional violation. The circumstances and environment that allowed a put-up job like the MSPB was to allegedly protect plaintiff's rights was a joke. A *Monell* Claim exists because the municipal policy or practice that existed here allowing people like Tobias to file complaints that have the effect of getting someone fired, results in a constitutional deprivation. *Christensen v. County of Boone*, 483 F.3d 454, 465 (7th Cir. 2007).

CONCLUSION

For all of the reasons stated above, Petitioner Tadeusz Palka seeks certiorari on this case.

Respectfully submitted,

L. Steven Platt
Pedersen & Houpt
161 N. Clark, Suite 3100
Chicago, IL 60601
(312) 261-2171
lsplatt@pedersenhoupt.com

Attorney for Petitioner

In the
United States Court of Appeals
For the Seventh Circuit

No. 08-4245

TADEUSZ PALKA,

Plaintiff-Appellant,

v.

ROGER SHELTON, Cook County Sheriff
Police Detective, individually, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 1:07-cv-05432 – **Virginia M. Kendall**, *Judge.*

ARGUED October 7, 2009 – DECIDED October 7, 2010

Before RIPPLE, KANNE, and SYKES, *Circuit Judges.*

SYKES, *Circuit Judge.* Tadeusz Palka was employed for 28 years as a Deputy Sheriff in the Cook County Sheriff's Department. His son Peter was an aspiring police officer enrolled in the Chicago Police Department's Police Academy. He did not complete the program, however. He was terminated from the Academy, ostensibly for not having mastered the Police Department's firearms manual. Palka thought his son had been targeted for termination based on

his Polish ethnicity, and he intervened on his son's behalf with Matthew Tobias, the Chicago Police Department official who was in charge of the Academy. The intervention did not end well; Peter Palka was not reinstated. A few weeks later, a strange phone call was received by the elementary school Tobias's children attended. The caller had a Polish accent and made inquiries about Tobias's children. Tobias traced the call to the Cook County Building, which confirmed his suspicion that Tadeusz Palka was the anonymous caller.

Tobias filed a complaint against Palka with the Internal Affairs Division of the Sheriff's Department, and Palka was suspended with pay during the ensuing investigation. A hearing was eventually scheduled before the County's Merit Systems Protection Board, but Palka resigned his position just before the hearing. He then filed this § 1983 action against Cook County, the City of Chicago, the Sheriff, and numerous employees of both the Sheriff's Department and the Police Department. He claimed the defendants violated his procedural and substantive due-process rights prior to his suspension and resignation, and deprived him of his interest in "occupational liberty." His claims against the City and County were brought pursuant to *Monell v. Department of Social Services*, 436 U.S. 658 (1978). After Palka filed a second and then a third amended complaint, the district court granted the defendants' motion to dismiss Palka's claims with prejudice. We affirm.

I. Background

Tadeusz Palka was a Cook County Deputy Sheriff, and his son Peter was in training to become a police officer at the Chicago Police Academy. In February 2007 Peter was terminated from the Academy. Palka believed his son was singled out for termination because he is Polish, and he contacted Assistant Deputy Superintendent Matthew Tobias, the head of the Police Academy, to complain. Palka tried to convince Tobias to reinstate Peter, but Tobias refused, telling Palka that Peter was terminated based on his lack of knowledge regarding the Police Department's firearms manual.

On May 9, 2007, an unidentified caller phoned the school in Park Ridge, Illinois, that Tobias's children attended and made inquiries about the children. When the school receptionist asked the caller to identify himself, the caller stated he was a "friend" and wanted to send the children flowers for their birthdays. The receptionist reported the call to Tobias and told him the caller was a man with a Polish-sounding Eastern European accent. Based on this information and the recent dispute over Peter Palka's termination from the Police Academy, Tobias suspected that Tadeusz Palka was the caller. Tobias launched an investigation, asking Nicholas Roti, who was then the commander of the Police Department's Gang Crimes Unit, to look into the call. Roti instructed two subordinates to retrieve the school's phone records and trace the call using "whatever method would get the info the quickest."

The phone records r .vealed that on the afternoon of May 9, the school received a call from a telephone number at the Cook County Building at 69 West Washington Street in downtown Chicago. This confirmed Tobias's suspicion that Palka was the caller, so he reported the call to the Park Ridge Police Department. He also opened a Police Department Original Case Incident report and filed a "Selective Enforcement – Non-Traffic" report with the Department; this allowed him to run Palka's license plate and driver's license through the "Leads System" to check if Palka had any outstanding warrants.

Tobias also asked Deputy Superintendent Constantine Andrews and Commander Joseph Salemme of the Chicago Police Department to speak with Palka. At around 10 p.m. on May 10, 2007, Andrews and Salemme went to Palka's residence in suburban Norridge, Illinois. Palka was not home when they arrived; the complaint alleges that the officers woke up an elderly neighbor to ascertain Palka's whereabouts. When Palka arrived home at about 10:30 p.m., the officers accused him of making the phone call to Tobias's children's school the day before. Palka denied making the call. The officers continued to insist that he was the caller, but they also told him that the call was not a "big deal" and he should not "do it anymore."

On the morning of May 11, 2007, Tobias filed a complaint with the Sheriff's Department's Office of Internal Affairs accusing Palka of making the telephone call. In the complaint Tobias said that he, his

wife, and the school staff considered the phone call to be threatening; they were concerned that Palka was attempting to stalk and possibly harm his children, and the school staff feared for the safety of the entire student body. The complaint also stated that Palka had attempted to adversely affect Tobias's employment status with the Chicago Police Department as revenge for Peter's termination from the Police Academy. Later that same day, in response to Tobias's complaint, Palka's supervisor and the head of Internal Affairs summoned Palka to a meeting, confiscated his badge and firearm credentials, de-deputized him, and placed him on paid suspension. Palka alleges that he was told he was being de-deputized because of a phone call from a "big wheel" at the Police Department.

About two months later, in July 2007, Sheriff's Detective Roger Shelton and another detective met with Palka and his attorney. The detectives told Palka they would refer the telephone call incident to the Cook County State's Attorney for possible criminal prosecution unless Palka voluntarily resigned as a Sheriff's Deputy. Palka refused to resign. Although the detectives did discuss the matter with the State's Attorney's Office, no charges were filed.

The disciplinary proceedings moved forward, however, and charges were eventually filed against Palka with the Merit Board, recommending that his employment be terminated. A hearing was scheduled for March 2008, but before it was held, Chief Edward Carik of the Sheriff's Department told Palka that if

he retired, the Merit Board action would "go away" and he would receive full retirement benefits, including his retirement badge and firearms credentials, which would permit him to obtain another job in law enforcement. Palka accepted this advice and resigned, but he has not received his retirement badge and credentials.

Palka then filed this suit alleging he was deprived of his due-process rights in violation of 42 U.S.C. § 1983. The district court dismissed Palka's first two complaints without prejudice; Palka's third amended complaint is the subject of this appeal. In that complaint Palka named as defendants Cook County, the Sheriff, the City of Chicago, and numerous officials in the Police and Sheriff's Departments. The district court "charitably" construed the complaint to allege procedural and substantive due-process claims, a claim for deprivation of occupational liberty, and *Monell* claims against the City and County. The defendants moved to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The district court granted this motion and dismissed Palka's claims with prejudice, and Palka appealed.

II. Discussion

We review the district court's order dismissing the complaint de novo and will affirm if the allegations fail "'to state a claim for relief that is plausible on its face.'" *Justice v. Town of Cicero*, 577 F.3d 768,

771 (7th Cir. 2009) (quoting *Ashcroft v. Iqbal,* 129 S. Ct. 1937, 1949 (2009)). In reviewing the sufficiency of the complaint, we accept the facts pleaded in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *Id.*

A. Procedural and Substantive Due-Process Claims

Palka's complaint alleges two separate procedural due-process violations: First, he claims he was deprived of due process prior to his suspension; and second, he claims he was deprived of due process prior to his resignation, which he contends was coerced. To plead a procedural due-process claim, Palka must allege a cognizable property interest, a deprivation of that interest, and a denial of due process. *Hudson v. City of Chicago,* 374 F.3d 554, 559 (7th Cir. 2004). As a threshold matter, the procedural due-process claims against the City and its employees necessarily fail. Because the County, not the City, was Palka's employer, Palka cannot sue the City and its employees for depriving him of due process in connection with the loss of his employment.

Nor has Palka stated a cognizable claim against Cook County or any of its employees. A property interest in continued employment "can be created in one of two ways, 1) by an independent source such as state law securing certain benefits; or 2) by a clearly implied promise of continued employment." *Phelan v. City of Chicago,* 347 F.3d 679, 681 (7th Cir. 2003)

(internal quotation marks omitted). Due-process claims in the context of public employment require an entitlement to continued employment; more specifically, the plaintiff must have "a legitimate claim of entitlement not to lose a valuable governmental benefit except for cause." *Lee v. County of Cook,* 862 F.2d 139, 141 (7th Cir. 1988) (quotation marks omitted). A collective-bargaining agreement can create an employment contract – and thus a promise of continued employment – in some cases. *Krieg v. Seybold,* 481 F.3d 512, 519-20 (7th Cir. 2007); *see also Young v. N. Drury Lane Prods.,* 80 F.3d 203, 206 (7th Cir. 1996) (noting that a labor agreement is not an employment contract). When a plaintiff alleges that the due-process entitlement arises from a collective-bargaining agreement, he must identify specific terms of the agreement that contained a promise of continued employment. *Krieg,* 481 F.3d at 520; *see also Minch v. City of Chicago,* 486 F.3d 294, 302 (7th Cir. 2007).

Palka did plead that he was a member of a collective-bargaining unit but did not identify a provision in the collective-bargaining agreement that could feasibly give rise to a constitutionally protected property interest in continued employment. *See Krieg,* 481 F.3d at 520. The part of his complaint that comes closest is the allegation that he was scheduled to appear before the Merit Board on disciplinary charges; only tenured employees would be entitled to a hearing before this board. We will assume without deciding that this allegation is sufficient and move

on to consider whether Palka's allegations state a cognizable claim for violation of his right to procedural due process.

As we have noted, Palka has alleged he was deprived of due process prior to both his suspension and resignation. Regarding the former, Palka was suspended with pay, and a suspension with pay does not trigger due-process protections unless the suspension imposes a substantial indirect economic effect on the plaintiff. *Townsend v. Vallas,* 256 F.3d 661, 676 (7th Cir. 2001) (teacher's loss of coaching income after suspension with pay not sufficient to implicate due-process protections). Palka has not claimed that he suffered *any* indirect economic consequences as a result of his suspension with pay. Accordingly, to the extent that he claims he was deprived of due process prior to his suspension, he has not stated a valid constitutional claim.

Palka also alleged that he was deprived of due process prior to his resignation; this claim rests on his contention that his resignation was involuntary. A public employee who voluntarily resigns cannot complain about a lack of due process, but an "involuntary" resignation may in certain circumstances form the basis of a due-process claim. *Dusanek v. Hannon,* 677 F.2d 538, 543 (7th Cir. 1982). Two types of involuntary resignation may qualify – constructive discharge and coerced resignation. *Patterson v. Portch,* 853 F.2d 1399, 1405-06 (7th Cir. 1988). Constructive discharge occurs when an employer makes employment so unbearable that an employee resigns; coerced

resignation is characterized by the presence of a Hobson's choice in which the employee must resign or suffer severe consequences, such as facing criminal charges. *See id.* Palka's claim falls in the latter category; he alleges that the defendants forced him to choose between resigning to protect his retirement benefits or clearing himself before the Merit Board.

No doubt Palka was confronted with a difficult choice when the disciplinary charges were lodged against him and the Merit Board hearing loomed. He could retire with full benefits or appear before the Board and potentially be vindicated; the latter option, however, obviously risked termination and loss of his benefits if the charges were substantiated. But this is not the kind of choice that makes an otherwise voluntary resignation involuntary. The Merit Board provides adequate procedural protections to Cook County employees facing disciplinary charges, and its formal procedures were underway when Palka chose to resign. The Merit Board's disciplinary process satisfies the County's procedural due-process obligations, and the County and its officials cannot be held liable when an employee chooses not to avail himself of its protections. *See Dusanek,* 677 F.2d at 543 ("[A] state cannot be held to have violated due process requirements when it has made procedural protection[s] available and the plaintiff has simply refused to avail himself of them."). That Palka decided to resign rather than risk an unfavorable Merit Board decision does not make his resignation involuntary. The

district court was right to dismiss his procedural due-process claim.

The court also properly dismissed Palka's substantive due-process claim. This sort of claim is limited to violations of fundamental rights, *see Belcher v. Norton,* 497 F.3d 742, 753 (7th Cir. 2007), and employment-related rights are not fundamental; an alleged wrongful termination of public employment is not actionable as a violation of substantive due process unless the employee also alleges the defendants violated some other constitutional right or that state remedies were inadequate, *Montgomery v. Stefaniak,* 410 F.3d 933, 939 (7th Cir. 2005). Palka has not pleaded an additional constitutional violation or claimed that state-law remedies were inadequate. He therefore has failed to state an actionable substantive due-process claim.

Palka's substantive due-process claim also fails to the extent that he bases it on the conduct of the Police Department officials. The Due Process Clause protects citizens from abuses of power by executive officials – including law-enforcement officers – but official misconduct will rise to the level of a constitutional violation only if it shocks the conscience. *Russ v. Watts,* 414 F.3d 783, 789 (7th Cir. 2005); *see also County of Sacramento v. Lewis,* 523 U.S. 833, 846-47 (1998). Palka contends that the police officers' investigation – tracing the phone call to the school, their use of the "Leads System," and the fact that they traveled outside their jurisdiction to track him down at his house at night – subverted internal Police

Department rules and therefore qualifies as conscience-shocking official misconduct. It does not. The threshold for this kind of due-process claim is high; many forms of governmental misconduct are excluded. *Tun v. Whitticker,* 398 F.3d 899, 903 (7th Cir. 2005) ("It is one thing to say that officials acted badly, even tortiously, but – and this is the essential point – it is quite another to say that their actions rise to the level of a constitutional violation."); *Kernats v. O'Sullivan,* 35 F.3d 1171, 1175 (7th Cir. 1994) ("Of course, every official abuse of power, even if unreasonable, unjustified, or outrageous, does not rise to the level of a federal constitutional deprivation."). Accepting (as we must) Palka's allegations as true, he has failed to state a cognizable substantive due-process claim.

B. Occupational-Liberty Claim

Palka has also alleged a violation of his interest in occupational liberty. This claim appears to rest on Tobias's complaint to the Sheriff's Department and the County's failure to give him a retirement badge and firearms credentials following his resignation. An occupational liberty claim may arise when, after an adverse employment action, a public employer stigmatizes the employee by making public comments impugning his good name, honor, or reputation or imposes a stigma that forecloses other employment opportunities. *Bd. of Regents v. Roth,* 408 U.S. 564, 573-74 (1972). Under this doctrine, a plaintiff must plead that (1) the defendant made stigmatizing comments about him; (2) those comments were publicly

disclosed; and (3) he suffered a tangible loss of other employment opportunities as a result of the public disclosure. *Townsend*, 256 F.3d at 669-70. The public-disclosure element requires that the defendant actually disseminate the stigmatizing comments in a way that would reach potential future employers or the community at large. *Ratliff v. City of Milwaukee*, 795 F.2d 612, 627 (7th Cir. 1986) (no public disclosure and therefore no constitutional violation where communications regarding reasons for discharge were disseminated internally); *see also Johnson v. Martin*, 943 F.2d 15, 16-17 (7th Cir. 1991) (same).

Palka alleged that the complaint Tobias filed with the Sheriff's Department falsely asserted that he engaged in criminal conduct and that his failure to receive a retirement badge and firearms credentials upon his resignation exacerbated the impression left by the false allegations. But Tobias's complaint was not publicly disclosed; Tobias's stigmatizing allegations were made only to the Sheriff's Department, Palka's employer, and not a potential future employer. That the allegations were relayed to the State's Attorney's Office does not make a difference. The State's Attorney's Office has an obligation of confidentiality, and there is no allegation that Tobias's complaint reached potential future employers. An occupational-liberty claim requires "that the circumstances made it virtually impossible for [the plaintiff] to find a new position in his chosen profession." *Lashbrook v. Oerkfitz*, 65 F.3d 1339, 1349 (7th Cir.

1995) (citing *Ratliff*, 795 F.2d at 625). The district court properly dismissed this claim.

C. *Monell* Claim

Finally, Palka has asserted claims against the City and County under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). But because his complaint fails to state a claim for any constitutional violation, the City and County cannot be held liable; a *Monell* claim requires a municipal policy or practice that results in a constitutional deprivation. *Christensen v. County of Boone*, 483 F.3d 454, 465 (7th Cir. 2007) ("Because we have determined that all of plaintiffs' claims under federal law were properly dismissed, there can be no § 1983 liability for Boone County either.").

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TADEUSZ PALKA,

Plaintiff,

v.

COOK COUNTY, COOK COUNTY SHERIFF THOMAS DART, THOMAS KINSELLA, former COOK COUNTY SHERIFF'S DEPARTMENT INSPECTOR GENERAL, COOK COUNTY DETECTIVE ROGER SHELTON, COOK COUNTY SHERIFF ASSISTANT GENERAL COUNSEL PETER M. KRAMER, WILLIAM CUNNINGHAM, JR. Sheriff's Department Chief of Staff, HENRY BARSH, ASSISTANT EXECUTIVE DIRECTOR OF THE COOK COUNTY SHERIFF IAD, the city of CHICAGO, the CHICAGO POLICE DEPARTMENT ASSISTANT DEPUTY SUPERINTENDENT CONSTANTIN ANDREWS of the First Deputy's Office of the Chicago Police Department, Chicago Police Headquarters, CHICAGO POLICE

Case No. 07 C 5432

Judge
Virginia M. Kendall

(Filed Dec. 17, 2008)

COMMANDER JOSEPH SALEMME, Commander, Area 5 Detective Division, CHICAGO POLICE DEPARTMENT ASSISTANT DEPUTY SUPERINTENDENT MATTHEW TOBIAS of the Chicago Police Education and Training Division, and CHICAGO POLICE COMMANDER NICHOLAS J. ROTI, formerly Commander of OCD-Gang. Intelligence Section of the Chicago Police Department

Defendants.

MEMORANDUM OPINION AND ORDER

Tadeusz Palka ("Palka") filed a Third Amended Complaint[1] against Cook County, Cook County Sheriff Thomas Dart ("Dart"), former Cook County Sheriff's Department Inspector General Thomas Kinsella ("Kinsella"), Cook County Detective Roger Shelton ("Shelton"), Cook County Sheriff Assistant General

[1] Palka filed his initial Complaint on September 26, 2007 Palka filed a First Amended Complaint on December 4, 2007 This Court dismissed Palka's First Amended Complaint without prejudice on April 11, 2008 Palka filed a Second Amended Complaint on April 30, 2008, filed a corrected version of his Second Amended Complaint on May 1, 2008, and then filed a redacted version of his Second Amended Complaint on May 2, 2008 Finally, Palka filed a Third Amended Complaint on May 15, 2008, which is the subject of the Motions to Dismiss currently before this Court

Counsel Peter M. Kramer ("Kramer"), Sheriff's Department Chief of Staff William Cunningham, Jr. ("Cunningham"), Assistant Executive Director of the Cook County Sheriff Internal Affairs Department Henry Barsh ("Barsh") (collectively, "Cook County"), the City of Chicago ("the City"), Chicago Police Department Assistant Deputy Superintendent Constantin Andrews ("Andrews"), Chicago Police Department Assistant Deputy Superintendent Matthew Tobias ("Tobias"), Chicago Police Commander Joseph Salemme ("Salemme"), and Chicago Police Commander Nicholas J. Roti ("Roti") (collectively, "Individual Defendants") alleging a violation of 42 U.S.C. § 1983. The Individual Defendants, Cook County, and the City moved to dismiss Palka's Third Amended Complaint.

STATEMENT OF FACTS

The following facts are taken from the allegations in Palka's Complaint, which are accepted as true for purposes of deciding this motion to dismiss. Palka alleges that his son, Peter J. Palka ("Peter Palka"), was terminated from the Chicago Police Academy on February 1, 2007 due to his national origin (Polish). Third Amend. Compl. at ¶5. Palka spoke to Assistant Deputy Superintendent Tobias, the individual who terminated Peter Palka, and asked him to allow Peter Palka back in class. *Id.* at ¶ 6. Tobias refused, and Palka retained counsel to look into the matter. *Id.* at ¶¶ 7-8. Palka's attorney attempted to talk to Dora Henmann ("Henmann"), the Chicago Police Academy's

Firearms Instructor, about his son's termination from the Academy, but Henmann refused to discuss the matter. *Id.* at ¶¶ 9-12.

On May 9, 2007, Tobias learned that a threatening phone call was made to his children's school. *Id.* at ¶ 56. Tobias contacted Officers Andrews, Salemme, Chicago Police Commander Roti and other Chicago Police officers to investigate the phone call incident. *Id.* Tobias opened up a Chicago Police Department ("CPD") Original Case Incident Report as part of his investigation. *Id.* Tobias also visited the Park Ridge Police to report the incident. *Id.* After running checks on the phone numbers that were used to call his children's school Tobias learned that the calls came from a Cook County building. *Id.* Tobias also learned that the caller had an Eastern European accent (Polish). *Id.* Ex. C. Thinking Palka may have been the caller, Tobias ran Palka's name through the Chicago Police's Leads System. *Id.*

On the evening of May 10, 2007, at approximately 10:30 p.m. when Palka arrived home, he discovered Officers Salemme and Andrews waiting for him. *Id.* at ¶13. Prior to Palka's arrival, the officers woke up his neighbor to ask if Palka was at home. *Id.* at ¶14. When Palka pulled into his driveway, the officers asked to speak with him. *Id.* at ¶15. The officers accused Palka of making the threatening phone call to Tobias's children's school, an accusation that Palka denied. *Id.* at ¶¶ 16-19,

The officers told Palka that they knew it was him that called the school but that it was not "a big deal" and "don't do it anymore." *Id.* at ¶22. The officers also asked Palka if he had a son that was recently kicked out of the police academy and when Palka said yes, the officers told him that he should not "push" on that and that his son was not going to get his job back. *Id.* at ¶¶ 23-25. Palka told the officers he was talking to a lawyer about his son's reinstatement, and the officers then left Palka's home. *Id.* at ¶¶ 26-27. Palka asserts that Andrews and Salemme were out of their jurisdiction when they went to question him and that their visit violated police protocol. *Id.* at ¶ 28, 30.

The next day, May 11, 2007, Palka saw Chief Edward Carek ("Carek") and told him about Andrews' and Salemmes' visit the night before. *Id.* at ¶32, Carek said, "This is a serious thing if they came by your house." *Id.* at ¶33. Palka then went to Edward Wodnicki ("Wodnicki"), his supervisor, and told him about the prior evening. *Id.* at ¶34. Wodnicki told Palka not to worry. *Id.* at ¶35. Later that day, the Director of the Cook County Sheriff's Department Internal Affairs Division ("IAD"), Raymond T. Zene ("Zene"), visited Wodnicki. *Id.* at ¶36. Tobias had filed a General Complaint Register with the Sheriff's IAD alleging that Palka had made threatening phone call to his children's school. *Id.* at ¶ 56. Tobias further stated that he was scared for his children and that Palka was angry with Tobias because Peter Palka had been terminated from the police academy. *Id.* Palka was then called to Wodnicki's office, where

Zene took his badge and identifications, and put him on paid suspension. *Id.* at ¶37. Zene told Palka that a "big wheel" at the CPD told him to do this. *Id.* at ¶38. Wodnicki stated, "What did I tell you? You tried to help your son and you got screwed." *Id.* at ¶42. An Internal Affairs investigator later took Palka downstairs to "show everyone" that he was no longer a deputy. *Id.* at ¶43. Palka became sick over his situation and had do go on medical leave. *Id.* at ¶¶44.

After Palka was de-deputized, Zene summoned Palka to his office to discuss the phone call allegations. *Id.* at ¶ 46. There, IAD detectives Shelton and Davis claimed that Palka had told them that he was sorry and would not make any more phone calls. *Id.* at ¶47. Palka asserted that he never made the calls nor did he say such a thing. *Id.* at ¶48. The IAD detectives spoke to Palka's lawyer Sally Ann Cromin ("Cromin") and told her that they would drop the charges if Palka resigned from the Sheriff's Office. Palka refused the offer. *Id.* at ¶¶55-58. The IAD detectives told Palka's lawyer that they were referring him to the State's Attorney's Office for criminal prosecution. *Id.* at ¶ 50. On September 5, 2007, the IAD unit met with a Cook County Assistant State's Attorney to discuss the pending charges against Palka stemming from the phone call incident. *Id.* at ¶ 56. The Assistant State's Attorney, however, never pressed charges against Palka. *Id.* at 51.

Palka claims that the IAD detectives attempted to intimidate many of his friends and associates. *Id.* at ¶52. Palka asserts that he was being harassed

because he challenged Tobias's decision to dismiss his son from the police academy. *Id.* at ¶53.

In March 2008 Henry Barsh ("Barsh"), Assistant Executive Director of the IAD filed charges against Palka with the Merit Systems Protection Board ("MSPB") and recommended his termination. *Id.* at ¶ 55. After Palka was referred to the MSPB, he was approached by Carek who told him that if he retired the MSPB action would "go away" and he would receive his retirement badge and his firearms credentials like all other Sheriff retirees do. *Id.* at ¶ 57. Palka decided to resign from his position as a deputy sheriff. *Id.* at ¶ 52.

Palka alleges that the Individual Defendants abused their power when they conducted a high priority investigation concerning the phone calls to Tobias' children's school. Palka alleges that after the investigation revealed Palka's potential involvement in the phone call incident, Zene put him on paid suspension in violation of his collective bargaining agreement because Zene did not call his union representative to be present during the de-deputization process and during a subsequent interview with IAD. *Id.* at 39. Palka also alleges that Zene violated his collective bargaining agreement by not giving Palka an answer about his pending investigation until March of 2008 when he was brought up on charges before the MSPB. *Id.* at 40.

STANDARD

When considering a motion to dismiss under Rule 12(b)(6), a court must accept as true all facts alleged in the complaint and construe all reasonable inferences in favor of the plaintiff. *See Murphy v. Walker*, 51 F.3d 714, 717 (7th Cir. 1995). To state a claim upon which relief can be granted, a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A plaintiff need not allege all facts involved in the claim. *See Sanjuan v. Am. Bd. of Psychiatry & Neurology, Inc.*, 40 F.3d 247, 251 (7th Cir. 1994). However, in order to survive a motion to dismiss for failure to state a claim, the claim must be supported by facts that, if taken as true, at least plausibly suggest that the plaintiff is entitled to relief. *See Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007). Such a set of facts must "raise a reasonable expectation that discovery will reveal evidence" of illegality. *Id.* at 1965.

DISCUSSION

I. Section 1983

In order to state a claim pursuant to 42 U.S.C. § 1983, Palka must allege that the Defendants were acting under color of state law when they deprived him of a Constitutional right. *See Estate of Sims ex rel. Sims v. County of Bureau*, 506 F.3d 509, 514 (7thCir. 2007) (*citing Christensen v. County of Boone, Illinois*, 483 F.3d 454, 457 (7thCir. 2007)). "Section 1983 is not itself a source of any substantive rights,

but instead provides the means by which rights conferred elsewhere may be enforced." *Bublitz v. Cottey*, 327 F.3d 485, 488 (7thCir. 2003) (*citing Ledford v. Sullivan*, 105 F.3d 354, 356 (7th Cir. 1997)). To allege a §1983 violation, Palka must do more then make a general allegation that his Constitutional rights were violated, he must allege a deprivation of a specific Constitutional right. *See Trautvetter v. Quick*, 916 F.2d 1140, 1148 (7thCir. 1990) (citing *Wilson v. Civil Town of Clayton*, 839 F.2d 375, 379 (7thCir. 1988)). Here, read charitably, Palka's Third Amended Complaint alleges a § 1983 Due Process claim, a § 1983 Occupational Liberty claim and a Monell Claim.

A. § 1983 Due Process Claim

The Fourteenth Amendment imposes constraints on government actions which deprive an individual of "liberty" or "property" interests within the meaning of the Due Process Clause. *See Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). To assert a violation of the Due Process Clause, Palka must be able to show that he had a 'property interest' and that he was deprived of this interest without due process of law. *Phelan v.* City *of Chicago*, 347 F.3d 679, 681 (7th Cir. 2003) (citing *Bishop v. Wood*, 426 U.S. 341, 343 (1976)).

I. Property Interest

For his due process claim, Palka must first plead sufficient facts to show that he had a property interest. *See Phelan*, 347 F.3d at 681. Property interests

are not created by the Constitution, they are created by existing rules or understandings that stem from an independent source such as state law. *See Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985) (citing *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). A property interest can be established by demonstrating a property right in continued employment. *See Id.* In the employment context, a property interest can be created in one of two ways: (1) by an independent source such as state law; or (2) by a clearly implied promise of continued employment. *See Phelan,* 347 F.3d at 681 (citing *Shlay v. Montgomery*, 802 F.2d 918, 921 (7th Cir. 1986). Palka bears the burden of proving that he has a property interest in his job. *See Krieg v. Seybold*, 481 F.3d 512, 520 (7th Cir. 2007) (holding plaintiff bears the burden that he had a property interest in his job arising out of a state statute, state or municipal regulations, or a contract with a public entity).

Here, Palka asserts that the Defendants "acting under color of state law, deprived plaintiff of his property right to remain employed as a Sheriff's Deputy with a gold badge." Compl. ¶ 59. While this Court must accept all well-pleaded facts in the complaint as true, this Court does not have to accept as true conclusory statements of law or unsupported conclusions of fact. *See Snodderly v. R.U.F.F. Drug Enforcement Task Force*, 239 F.3d 892, 896 (7th Cir. 2001). Simply claiming a property right in a job without facts to support the naked conclusion is not enough to sufficiently plead a property interest.

See Lee v. County of Cook, 862 F.2d 139, 141-42 (7th Cir. 1988) (holding that to assert a property interest a plaintiff must allege enough facts to show that she "has a legitimate claim of entitlement not to lose a valuable governmental benefit except for cause"). Palka's Complaint sets forth no facts to show that he had a property interest in his position as a Sheriff's Deputy. Palka does not even identify the source of his alleged property interest. He does not allege that it was created by any state or city law, that he had a contract giving him tenure to remain employed at the Sheriff's office or that there was a clearly implied promise in his continued employment. *See Shlay*, 802 F.2d at 921. Palka's unsupported conclusion of fact that he had a property right to remain employed as a Sheriff's Deputy is insufficient to properly plead a property interest in employment.

Palka next alleges that "The Sheriff's Department suspended Palka in violation of the collective bargaining agreement because they did not call his union representative to be present during the de-deputization process and during a subsequent interview with IAD," and that "they also violated the contract by not giving Palka an answer concerning the so-called investigation that followed, within 30-days, and instead kept him in limbo under suspension until March of 2008 when they brought him up on charges before the Merit System Protection Board (MSPB) over the alleged phone call incident." Compl.¶¶ 39, 40. Here, Palka simply states that he had a collective bargaining agreement and that the

Defendants' violated that agreement; however, Palka's allegation that he had a collective bargaining agreement, without more, is insufficient to allege a property interest in his job. This is because a collective bargaining agreement is not a contract of employment and does not generally create a property interest in continued employment. *See Young v. N. Drury Lane Prods., Inc.*, 80 F.3d 203, 206 (7th Cir. 1996) ("a labor agreement is not a contract of employment, employees are hired separately and individually"). To demonstrate that his collective bargaining agreement created a federally protected property interest in his position as a Sheriff's Deputy, Palka would have had to allege that it made specific promises of continued employment or that it protected him from being fired except for cause. *See Krieg*, 481 F.3d at 520 (plaintiff must show that collective bargaining agreement made some specific promise of employment or contained a clause stating that employees may be discharged only for just cause to demonstrate that it creates a property interest), Palka, however, does not allege that his collective bargaining agreement gave him a right to continued employment and does not set forth any facts from which this Court could infer that his collective bargaining agreement provided him with a property interest in his position as a Sheriff's deputy.

Because a property interest is required to state a cause of action for a Due Process violation and Palka has failed to allege facts from which a property interest can be conferred, Palka has failed to state a

Due Process claim, *See e.g., Lee*, 862 F.2d at 141-42 (affirming dismissal of state employee's third amended complaint where plaintiff did not allege facts showing a property interest in her job); *Smith v. Bd. of Educ. of Urbana School Dist.*, 708 F.2d 258, 264-65 (7th Cir. 1983) (affirming dismissal for failure to state a claim where plaintiff's complaint did not allege facts from which a property interest in employment could be inferred). However, even if this Court were to find that Palka had pleaded a property interest, Palka's Due Process claim would nonetheless fail because his Complaint does not state facts sufficient to demonstrate a deprivation of a property interest without due process.

ii. Deprivation of Property Right Without Due Process

If Palka had sufficiently plead a property interest then the Defendants could not deprive him of this property interest without due process. *See Loudermill*, 470 U.S. at 538. Palka asserts that he was denied both procedural due process and substantive due process. This Court will address each in turn.

a. Procedural Due Process

The Due Process Clause guarantees fair procedure. *See Zinermon*, 494 U.S. 113,125 (1990). In procedural due process claims, the deprivation by state action of a constitutionally protected property interest is not itself unconstitutional; what is unconstitutional

is the deprivation of such an interest without due process of law. *See Carey v. Piphus*, 435 U.S. 247, 259 (1978) ("Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property."). Thus, even when there is a deprivation of a property interest, there is no violation of procedural due process actionable under § 1983 unless the government fails to provide the due process. *See Zinermon*, 494 U.S. at 126. Therefore, to determine if a violation of procedural due process occurred, it is necessary to ask what process the Defendants provided, and whether it was constitutionally adequate. *See Id.* While due process is a flexible concept that varies with the particular situation, the Constitution requires some type of hearing before the government deprives a person of liberty or property. *See e.g.*, *Loudermill*, 470 U.S. at 542 ("'[T]he root requirement' of the Due Process Clause" is "'that an individual be given an opportunity for a hearing before he is deprived of any significant protected interest'"; hearing required before termination of employment).

Palka first alleges that Defendants deprived him of procedural due process when they put him on paid suspension without a hearing. The problem with Palka's claim is that Palka acknowledges that he was put on paid suspension. Compl. ¶ 37. Because he was suspended with pay, Palka did not suffer any economic loss as a result of his suspension and non-pecuniary losses do not constitute property. *See Bordelon v. Chicago Sch. Reform Bd. Of Tr.*, 233 F.3d 524, 530

(7th Cir. 2000) ("[T]o recover for a deprivation of a property interest, [a plaintiff] must show some economic loss from the [government's] action, or at least an identifiable impact on his future income or economic benefits."). A suspension with pay, therefore, does not constitute a deprivation of a property right subject to federal constitutional protections. *See Barrows v. Wiley*, 478 F.3d 776, 780 (7th Cir. 2007) (citing *Dean v. Darosa,* 414 F.3d 731, 734 (7th Cir. 2005)) ("[A] job action that causes no pecuniary loss whatsoever does not implicate the Constitution."). Therefore, Palka did not have a due process right to a hearing prior to his paid suspension. *Luellen v. City of East Chicago*, 350 F.3d 604, 613 (7th Cir. 2003) (suspension with pay, without a hearing, did not violate due process).

Palka next alleges that he was denied procedural due process when he was deprived of his property right to remain employed as a Sheriff's Deputy without a hearing. Compl. ¶ 59, However, Palka was never terminated by the Sheriff's Department, he resigned. In March 2008, the Sheriff's Department brought Palka up on charges before the MSPB over the alleged phone call incident. Compl. ¶ 40. After Palka was referred to the MSPB for termination, Palka was told that if he wanted to retire then the MSPB action would "go away" and that Palka would receive a retirement badge and his firearm credentials. Compl. ¶ 57. Palka was entitled to, and would have received a hearing on the charges that were filed with the MSPB but instead decided to take the

Sheriff Department's offer and resign from his employment as a deputy sheriff. Compl. ¶ 52. Palka assertion that he had no choice but to resign does not turn his decision to resign into a formal discharge by the Sheriff's Department. Palka admits that certain allegations had been made against him, that investigations were taking place and that charges had been filed with the MSPB. Palka also admits that he was suspended, but paid, during his suspension. There is an inherent tension for any employee who is undergoing the kind of investigation that follows complaints of misconduct. Yet, no matter how uncomfortable the situation was for Palka, his situation is not comparable to intolerable working conditions in which a reasonable employee in his position would have felt compelled to resign. *See Levinstein v. Salafsky*, 414 F.3d 767, 775 (7th Cir. 2005) ("We conclude that a person who is on leave with pay . . . pending an investigation of serious job misconduct, who resigns rather than waits for the conclusion of reasonable prescribed due process procedures of the institution, has not from an objective standpoint been constructively discharged."). Therefore, even if Palka had stated a property interest in his employment as a Sheriff's Deputy (which he did not), he has failed to state a claim for a violation of his procedural due process.

b. Substantive Due Process

Palka also contends that the Defendants violated his substantive due process when they abused their

power by conducting a high priority investigation of Palka in the way that they did. Palka further contends that Defendants' decision to file formal charges against him and "push him out" was irrational because he had nothing to do with the making the threatening phone call to Tobias children's school. The scope of the protections afforded by substantive due process is limited, however, and applies only to decisions affecting fundamental rights. *See Belcher v Norton*, 497 F.3d 742, 752 (7th Cir. 2007). Substantive due process protects an individual from the exercise of governmental power without a reasonable justification. *Id.* at 753. Where the exercise of government power involves law enforcement officials, a plaintiff's substantive due process rights are violated where the alleged abuse of power "shocks the conscience." *Id.*

Here, the fundamental right at issue is Palka's claimed property right in continued employment. Employment rights, however, are state-created rights, and a public employee's interest in continued employment does not rise to the level of a "fundamental" right protected by substantive due process. *See Zorzi v. County of Putnam*, 30 F.3d 885, 895 (7th Cir. 1994) (stating that substantive due process does not protect occupational liberty). Where a plaintiff complains that he has been unreasonably deprived of a state-created property interest, to allege a substantive due process violation, the plaintiff must allege that the government's decision was arbitrary and irrational and that an additional constitutional violation occurred or that available state remedies were inadequate. *See Doherty v. City of Chicago*,

75 F.3d 318, 325 (7th Cir. 1996); *Kauth v. Hartford Ins. Co. of Illinois*, 852 F.2d 951, 958 (7th Cir. 1988) ("[I]n cases where the plaintiff complains that he has been unreasonably deprived of a state-created property interest, without alleging a violation of some other substantive Constitutional right or that the available state remedies are inadequate, the plaintiff has not stated a substantive due process claim.").

Palka's first alleges that the Defendants violated his substantive due process because they abused their authority when they conducted their investigation of him in the manner in which they did. Specifically, Palka contends that Defendants abused their authority when they used the Leads System to run his name, when they ran his driver license to check for outstanding warrants, when they went out of their jurisdiction to talk to him at his home, when they made false accusations against him regarding the alleged phone call and when they filed formal charges against him with the MSPB. However, as previously mentioned, to state a claim for a violation of his substantive due process Palka must allege facts that demonstrate that the Defendants' alleged abuse of power "shocks the conscience" and that their decisions were arbitrary and irrational. *See Belcher*, 479 F.3d at 752-53. Here, Tobias was given information by his children's school that someone had made a threatening phone call and inquired about his children. After learning this information Tobias contacted other individuals at the police department to help him investigate this alleged phone call. Tobias

learned that the call was made by an individual with an Eastern European (Polish) accent. Palka, who is Polish, had recently approached Tobias because he was upset that his son was fired from the police academy. Tobias traced the phone call that was made to his children's school to a phone number belonging to a Cook County building. Tobias knew that Palka was a Cook County employee. When Tobias asked Andrews and Salemme to further investigate the matter, Andrews and Salemme went to Palka's house to ask him questions surrounding the alleged phone call.

Before formal charges were filed against Palka with the MSPB, Tobias opened up a CPD report and filed a General Complaint Register against Palka with the Sheriff Department's IAD. Tobias alleged that Palka called his children's school inquiring if they were present and put him, his wife and the schools staff in reasonable fear that Palka was stalking his children and that he had intentions of possibly harming them.

These facts as pleaded demonstrate that Tobias had reason to conduct an investigation into the threatening phone call that was made to his children's school and to enlist the Police Department to assist in the investigation. Even if the Defendants abused their official authority while conducting the investigation by going outside their jurisdiction to question Palka or by using the Leads System to run his name, these alleged abuses of power are not sufficient for Palka show that the Defendants' violated

his substantive due process rights, This is because Defendants' alleged abuses of power do not describe conduct that amounts to a constitutional violation, the alleged conduct is not "conscience shocking." See *e.g., Kernats v. O'Sullivan*, 35 F.3d 1171, 1175 (7th Cir. 1994) ("every official abuse of power, even if unreasonable, unjustified, or outrageous; does not rise to the level of a federal constitutional deprivation"). Taking Palka's allegations as true, Defendants' decision to file formal charges against Palka with the MSPB was not arbitrary or irrational because Palka himself alleges that the investigation was initiated as a result of the threatening phone call. Palka allegations do not rise to the level of an abuse of power by Tobias that was "conscious shocking."

Additionally, Palka has failed to allege the inadequacy of state remedies and has not alleged that any of his other substantive Constitutional rights were violated. *See Doherty v. City of Chicago*, 75 F.3d 318, 325 (7th Cir. 1996); *Kauth*, 852 F.2d at 958. Therefore, even if Palka had a property interest in his continued employment, he has failed to state a claim for a violation of his substantive due process.

B. Occupational Liberty Claim

Palka next raises a Fourteenth Amendment claim, alleging a deprivation of his occupational liberty interest in his career as a Sheriff's Deputy and a law enforcement officer. Specifically, Palka contends that all of the Defendants deprived him of his "property

right to remain employed as a Sheriff's Deputy with a gold badge" and his "property right to obtain another law enforcement job, depriving him of a chance to earn his chosen livelihood, in violation of the Constitution of the United States." Compl. ¶ 59.

The concept of liberty protected by the Due Process Clause includes one's occupational liberty, or "the liberty to follow a trade, profession, or other calling." *Wroblewski v. City of Washburn*, 965 F.2d 452, 455 (7th Cir. 1992). The government violates an employee's occupational liberty interest when, in the course of discharge, failure to rehire, or other adverse employment action, the employer stigmatizes the employee by making public comments that impugn "the individual's good name, reputation, honor, or integrity" or impose a "stigma or other disability on the individual which forecloses other opportunities." *Roth*, 408 U.S. at 573. The Fourteenth Amendment protects only the individual's liberty to pursue a particular occupation, however, and not the individual's right to any one job. *See Townsend v. Vallas*, 256 F.3d 661, 670 (7th Cir. 2001).

To sufficiently plead the deprivation of an occupational liberty interest, Palka must allege: (1) that the Defendants made stigmatizing comments about him; (2) that the comments were publicly disclosed; and (3) that he suffered a tangible loss of other employment opportunities as a result. *See Townsend*, 256 F.3d at 669-70.

I. Stigmatizing Comments and Public Disclosure

To be actionable, statements made by a public official must be false assertions of fact; neither "true but stigmatizing" statements nor "statements of opinion, even stigmatizing ones" will suffice to meet this standard. *Strasburger v. Bd. of Educ. Comm. Unit Sch. Dist. No. 1*, 143 F.3d 351, 356 (7th Cir. 1998). Not every comment that could damage an individual's reputation is actionable; however, the Fourteenth Amendment only protects against those comments that could seriously damage one's reputation and standing in the community. *See Ulichny v. Merton Comm. Sch. Dist.*, 249 F.3d 686, 705 (7th Cir. 2001).

After a plaintiff has demonstrated that a defendant made stigmatizing statements, he must allege that the statements were publically disclosed. *See e.g. Townsend*, 256 F.3d at 669-70; *Harris v. City of Auburn*, 27 F.3d 1284, 1286 (7th Cir. 1994) (deprivation of occupational liberty that was "virtually devoid of any information regarding the public disclosure" of the statements was insufficient to state a claim); *Clark v. Maurer*, 824 F.2d 565, 567 (7th Cir. 1987) (no injury until the damaging information is made public); *Lashbrook v. Oerkfitz,* 65 F.3d 1339, 1349 (7th Cir. 1995) ("[T]he government must have actually participated in disseminating the information to the public").

Here, Palka's Complaint alleges that on May 11, 2007, Tobias falsely and without a reasonable basis complained to the Sheriff's Department IAD, in a General Complaint Register, that Palka telephoned the church office of his children's school to inquire if Tobias' children were present. Tobias falsely told the IAD, and included in the Complaint Register, that Palka's telephone call to the school put members of the church staff and Tobias' wife in fear that Palka was attempting to stalk Tobias' children, that Tobias feared that Palka had intentions of harming his children, that Palka had caused the principal and the teaching staff at the school to be in fear for the safety and well-being of Tobias' children, and that Palka had made numerous attempts to adversely impact Tobias' position with the CPD in retribution for recommending the employment discharge of his son Peter Palka. Palka also alleges that Tobias told Andrews, Salemme, Roti and other police officers that a threatening phone call was made to his children's school and asked them to help him investigate the incident. Finally, Palka alleges that on September 5, 2007, the IAD unit of the Sheriff's Department met with the Cook County State's Attorney's Office and told them about the phone call incident.

Palka has pled sufficient facts to allege that Defendants' allegations against him were stigmatizing. Allegations that an individual engaged in criminal conduct, if false, may injure an individuals good name, damage an individual's reputation in the community and be considered stigmatizing. *See e.g. Ratliff v. City*

of Milwaukee, 795 F.2d 612, 626-27 (7th Cir. 1986) (allegations that plaintiff was untruthful, failed to obey orders, neglected her duties and was insubordinate were stigmatizing). Here, Palka alleges that the Defendants accused him of making a threatening phone call to Tobias' children's school in an attempt to stalk them and Palka maintains that these allegations are false.

Palka's Complaint does not, however, allege that Defendants publically communicated these stigmatizing comments. Palka's Complaint only alleges that the Defendants communicated these allegations to individuals within the CPD, the Sheriff's Office and the State's Attorney's Office. Allegations against an individual are not made public for purposes of satisfying the public disclosure requirement for a violation of a liberty interest if the allegations are only communicated internally. *See e.g. Ratliff*, 795 F.2d at 627 (no public disclosure, and therefore no deprivation of a liberty interest where defendants did not publicize the reasons for discharge beyond the proper chain of command within the police department); *Johnson v. Martin*, 943 F.2d 15 (7th Cir. 1991) (no public disclosure when potentially stigmatizing information in a discharged employee's personnel file that had not been disseminated beyond the proper chain of command in the police department and had not been made public). Because Palka's Complaint does not allege that Tobias or any of the Defendants disclosed any information concerning Palka to anyone other than the Sheriff's Department, the CPD and the

States Attorney's Office, he has failed to plead that the Defendants' publically disclosed the purported stigmatizing information. Public disclosure is required to show a deprivation of an occupational liberty interest. Therefore, Palka has failed to state a claim for a deprivation of his occupational liberty.[2]

II. Monell Claim

In his Third Amended Complaint, Palka seeks to hold Cook County and the City liable for his alleged Constitutional violations. A municipal government, however, cannot be held liable under §1983 "unless the deprivation of constitutional right is caused by municipal policy or custom." *Kujawski v. Board of Comm'rs of Bartholomew County, Indiana*, 183 F.3d 734, 737 (7th Cir. 1999). To support his Monell Claim, Palka alleges Defendants have a widespread practice of "intimidation, harassment and retaliation of anyone who crosses ADS Tobias or anyone at the Deputy Superintendent or Commander level at the CPD, and that the Sheriff's Department gives inordinate attention to the unsubstantiated complaints against its employees by anyone who is a "big wheel" at the C.D."

---

[2] Because Palka has failed to satisfy the public disclosure requirement necessary to establish a deprivation of an occupational liberty interest, this Court does not need to address the third requirement that Palka allege facts sufficient to show that he suffered a tangible loss of other employment opportunities as a result of publically disclosed stigmatizing comments *See Townsend*, 256 F.3d at 669-70.